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THE
Englishman's Right:
A
DIALOGUE,
BETWEEN A
BARRISTER at LAW

AND A
JURMAN;
PLAINLY SETTING FORTH,
I. The ANTIQUITY,
II. The EXCELLENT DESIGNED USE,
III. The OFFICE, AND JUST PRIVILEGES,
OF JURIES,

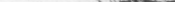
By the Law of England.

By Sir JOHN HAWLES, Knight,
SOLICITOR-GENERAL to the late King WILLIAM.

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P R E F A C E,

AS the security of our persons, our reputations, our properties, and our liberties, depends upon Jurors ; it can never be unreasonable to inform, or to remind them of their *duties*. While they remain ignorant of the nature of their station, they cannot determine with propriety ; while they feel not its importance, they will not conduct themselves with spirit. When questions, however, which relate to the welfare of the PEOPLE, are agitated in courts of justice : instructions of this kind become of more than ordinary importance. Errors upon these occasions may be attended with fatal consequences ; since powers will be introduced, which may, in the end, overturn the Constitution.

But it is not upon the good intentions of Jurymen only, that we must depend. If they should be prevented, either by fraud or by force

from discharging the trust reposed in them; their endeavours will avail little to the protection of the subject. Their *rights* ought, therefore, to be guarded against all attacks; especially as men of great eminence in the law, have publicly declared that they have lately been invaded :---and, to be defended, they must be understood.

A knowledge, then, of whatever relates to the office of Juries, seems at this time essentially necessary; since from hence alone can arise the proper *execution* of it's *duties*, and the *preservation* of it's *rights*. To promote this end, the following pamphlet is now republished. Its character, for perspicuity, and strength of reasoning, is so well established, that it is needless to enlarge upon it here. If it meets with the success which its merit deserves, it will, perhaps, be a principal means of preserving the trial by Jury, in its full force, to posterity.

A D V E R T I S E M E N T

TO THE

R E A D E R.

THIS treatise has passed through many Editions. It appeared first in the Year 1680; it was Re-printed in the Year 1731, and again in 1752, 1763, 1764, 1770, and 1771; and is now presented to the Public at least for the *eighth* time.

N. B. Many circumstances might lead the reader to suspect, that this Dialogue has been altered in order to accommodate to the present times. This edition, however, has been carefully collated with the *first*, which was Printed in London, for RICHARD JANEWAY, in Queen's Head Alley, Paternoster-Row, in the year 1680. So scrupulously has the Original been adhered to, that not a single word has been altered; except in the translation of the Latin sentences in page 3, the latter of which was before unintelligible. Liberties, indeed, have been taken with the orthography, and pointing; but these have not in the least affected the sense.

The above is an exact Copy of the Advertisement, which appeared with the eighth edition, and the LONDON CORRESPONDING SOCIETY feel the sincerest pleasure in presenting at least a tenth to the Public, at this critical juncture.



T H E
ENGLISHMAN'S RIGHT,
Ec. Ec. Ec.

Barrister.

MY old Client! a good morning to you: whither so fast? you seem intent upon some important affair.

Juryman. Worthy sir! I am glad to see you thus opportunely, there being scarce any person that I could at this time rather have wished to meet with.

Barr. I shall esteem myself happy, if in any thing I can serve you — The business, I pray?

Juryman. I am summoned to appear upon a Jury, and was just going to try if I could get off. Now I doubt not but you can put me into the best way to obtain that favour.

Barr. It is probable I could: but first let me know the reasons why you desire to decline that service.

Juryman. You know, Sir, there is something of trouble and loss of time in it:—and men's lives, liberties, and estates (which depend upon a jury's *guilty*, or *not guilty*, for the plaintiff, or for the defendant) are weighty things. I would not wrong my conscience for a world, nor be accessory to any man's ruin. There are others better skilled in such matters. I have ever so loved peace, that I have forborne going to law (as you well know) many times, though it hath been much to my loss.

Barr. I commend your tenderness and modesty; yet must tell you, these are but general and weak excuses.

As for your *time* and *trouble*, it is not much; and however can it be better spent than in doing justice, and serving your country? To withdraw yourself in such cases, is a kind of sacrilege, a robbing of the public of those duties which you justly owe it. The more *peaceable* man you have been, the more fit you are: for the office of a Juryman is, conscientiously to judge his neighbour; and needs no more *law* than is easily learnt to direct him therein. I look upon you therefore as a man well qualified with estate, discretion, and integrity; and if all

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such

such as you should use private means to avoid it, how would the king and country be honestly served? At that rate we should have none but fools or knaves entrusted in this grand concern, on which (as you well observe) the lives, liberties, and estates of all *England* depend.

Your *tenderneſs* not to be *acceſſory* to any man's being wronged or ruined, is (as I ſaid) much to be commended. But may you not incur it unawares, by ſeeking thus to avoid it? *Pilate* was not innocent becauſe he waſhed his hands, and ſaid, "He would have nothing to do with the blood of that juſt one." There are faults of omiſſion as well as commiſſion. When you are legally called to try ſuch a cauſe, if you ſhall ſhuffle out yourſelf, and thereby perſons perhaps leſs conſcientious happen to be made uſe of, and ſo a villian eſcapes juſtice, or an innocent man is ruined, by a prepoſſeſſed or negligent verdict; can you think yourſelf in ſuch a caſe wholly blameleſs? "*Qui non prohibet cum poteſt, iubet*;" "*That man abets an evil, who prevents it not, when it is in his power*." "*Nec caret ſcrupulo ſocietatis occultæ, qui evidenter facinori deſinit obviare*;" "*Nor can he eſcape the ſuſpicion of being a ſecret accomplice, who evidently declines the prevention of an atrocious crime*."

Jurym. Truly, I think a man is bound to do all the good he can; eſpecially when he is lawfully called to it. But there ſometimes happen nice caſes, wherein it may be difficult to diſcharge one's conſcience without incurring the diſpleaſure of the court, and thence trouble and damage may ariſe.

Barr. That is but a vain and needleſs fear. For as the jurors privileges (and every *Engliſhman's* in and by them) are very conſiderable; ſo the laws have no leſs providently guarded them againſt invaſion or uſurpation. So that there needs no more than, firſt, underſtanding to know your duty; and, in the next place, courage and reſolution to praſtiſe it with impartiality and integrity, free from accuſed bribery and malice or (what is full as bad in the end) baſe and ſervile fear.

Jurym. I am ſatiſfied, that as it is for the advantage and honour of the *public*, that men of underſtanding, ſubſtance and honeſty, ſhould be employed to ſerve on juries, that *juſtice* and *right* may fairly be adminiſtered; ſo it is their *own intereſt* when called thereunto, readily to beſtow their attendance and ſervice, to prevent *ill precedents* from men otherwiſe qualified; which may by degrees fatally, though inſenſibly, undermine our juſt birth-rights, and perhaps fall heavy one day upon us or our poſterity. But, for my own part, I am fearful leſt I ſhould ſuffer through my ignorance of the duty and office of a juryman

juryman; and, therefore, on that account principally it is, that I desire to be excused in my appearance; which if I understood but so well as I hope many others do, I would with all my heart attend the service.

Barr. You speak honestly, and like an *Englishman*. But if that be all your cause of scruple, it may soon be removed, if you will but give yourself a very little trouble of enquiry into the necessary provisions of the law of *England* relating to this matter.

Jurym. There is nothing (of a temporal concern) that I would more gladly be informed in; because I am satisfied, it is very expedient to be generally known. And first, I would learn *how long* trials by juries have been used in this nation*.

Barr. Even time out of mind;—so long, that our best historians cannot date the original of the institution; being indeed cotemporary with the nation itself, or in use as soon as the people were reduced to any form of civil government, and administration of justice. Nor have the several conquests of revolutions, the mixtures of foreigners, or the mutual feuds of the natives, at any time, been able to suppress or overthrow it. For,

1. That juries (the thing in effect and substance, tho' perhaps not just the number of twelve men) were in use among the *Britons*, (the first inhabitants of this island) appears by the ancient monuments and writings of that nation; attesting that their Freeholders had always a share in all trials and determinations of differences.

2. Most certain it is, that they were practised by the *Saxons*,† and were then the only courts or at least an essential, and the greater part of all courts of judicature: for so (to omit a multitude of other instances) we find in king *Ethelred's* Laws, "*In singulis Centuriis, &c.*" "*In every hundred let there be*" a court, and let twelve ancient freemen, together with the Lord, (or rather, according to the *Saxon*, the Greve, i. e. the chief officer amongst them) be sworn, that they will not condemn any person that is innocent, nor acquit any one "that is guilty."

3. When the *Normans* came in, *William*, tho' commonly called the *Conqueror*, was so far from abrogating this privilege

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of

* Our author, in his title-page, told us, that he intended to point out, with respect to Juries, 1. their antiquity; 2. their excellent designed use; 3. their office and just privileges. In answer to the Juryman's question, and in compliance with his own promise he is now going to treat of the antiquity of Juries.

† *Lamb. p.* 218. *Coke, 1 part, Institutes, fol.* 155.

of Juries*, that in the fourth year of his reign, he confirmed all king *Edward* the Confessor's laws, and the ancient customs of the kingdom, whereof this was an essential and most material part. Nay, he made use of a Jury chosen in every county, to report and certify on their oaths what those laws and customs were; as appears in the proem of such his confirmation.

4. Afterwards when the *Great Charter*, commonly called *Magna Charta*, (which is nothing else than a recital, confirmation, and corroboration of our ancient *English* liberties) was made and put under the great seal of *England*, in the ninth year of King *Henry* the Third, (which was *Anno Domini* 1225) then was this privilege of trials by Juries in an especial manner confirmed and established; as in the fourteenth chapter, "That no amercements shall be assessed, but by the oath of good and honest men of the vicinage." And more fully in that golden nine-and-twentieth chapter—"No free-man shall be taken or imprisoned, nor be disseised of his freehold or liberties, or free customs, or be out-lawed, or exiled, or any other way destroyed, nor shall we pass upon him, or condemn him, but by the lawful judgement of his peers, &c." Which Grand Charter having been confirmed by above thirty acts of parliament, the said right of Juries thereby, and by constant usage, and common custom of *England* which is the common law, is brought down to us as our undoubted birth-right, and the best inheritance of every *Englishman*. For as that famous lawyer, chief justice *Coke*, in the words of *Cicero*, excellently avers, "*Major hæreditas venit unicuique nostrum a jure & legibus, quam a parentibus.*" "It is a greater inheritance, and more to be valued which we derive from the fundamental constitution and laws of our country than that which comes to us from our respective parents:" for without the former, we have no claim to the latter.

Jurym. But has this method of trial never been attempted to be invaded or jostled out of practice?

Barr. It is but rarely that any have arrived to so great a confidence: "For it is a most dangerous thing to shake, or alter, any of the rules, or fundamental points of the common law, which in truth are the main pillars, and supporters of the fabric of the commonwealth;" these are judge *Coke's* words†. Yet sometimes it has been endeavoured: but so sacred and valuable was the institution in the eyes of our ancestors,

and

* See *Spelman's Glossar.* in the word *Jurata*.

† 2 Institut. fol. 56.

‡ 2 Institut. p. 74.

and so tenacious were they of their privileges, and zealous to maintain, and preserve such a *vital part* of their birth-right and freedom; that no such attempts could ever prove effectual, but always ended with the shame and severe punishment of the rash undertakers. For example,

1: *Andrew Horn*, an eminent lawyer, in his book, entitled *the Mirror of Justices*, (written in the reign of King *Edward I.* now near 400 years ago) in the first chapter, and first section, records, That the renowned Saxon King *Alfred* caused four-and-forty justices to be hanged in one year, as murderers, for their false judgements. And there recites their particular crimes, most of them being in one kind or other infringements, violations, and encroachments of and upon the rights and privileges of Juries. Amongst the rest, that worthy author tells us, he *hanged one justice Cadwine, because he judged one Hackwy to death without the consent of all the Jurors; for whereas he stood upon his Jury of twelve men, because three of them would have saved him, this Cadwine removed those three and put others in their room on the Jury, against the said Hackwy's consent.* Where we may observe, that though at last twelve men did give a verdict against him, yet those, so put upon him, were not accounted his Jurors; by reason all, or any of them, who were first sworn to try him, could not (by law) be removed, and others put in their stead: And that such illegal alteration was then adjudged a capital crime, and forthwith the said *Cadwine* was hanged.

2. A second instance I shall give you in the words of the lord chief justice *Coke**: "Against this ancient and fundamental law (and in the face thereof) there was in the eleventh year of King *Henry VII cap. 3.* an act of parliament obtained (on fair pretences, and a specious preamble, as to avoid divers mischiefs, &c. †) whereby it was ordained, That from thenceforth, as well justices of assize, as justices of the peace, upon a bare information for the king before them made, without any finding or presentment by the verdict of twelve men, should have full power and authority, by their discretions, to hear and determine all offences and contempts committed or done by any person or persons against the form, ordinance, or effect of any statute made and not repealed, &c." "By colour of which act" [saith *Coke*] "shaking this fundamental law" he means, touching all trials to be by Juries] "it is not credible what HORRIBLE OPPRESSIONS and EXACTIONS, to the undoing of

* *Coke, 2 part of Inst. fol. 51.*

† The hackneyed preamble of every Statute, hostile to the Liberties, of the people.

of MULTITUDES of people, were committed by Sir *Richard Empson* Knight, and *Edmund Dudley* Esq. [being justices of the peace] throughout *England*; and upon this unjust and injurious act [as commonly in like cases it falleth out] a new office was erected, and they made masters of the king's forfeitures."

But not only this statute was justly, soon after the decease of *Henry VII.* repealed by the stat. of the 1 *Hen. VIII. cap. 6.* but also the said *Empson* and *Dudley* [notwithstanding they had such an act to back them, yet it being against *Magna Charta*, and consequently void] were fairly executed for their pains; and several of their under-agents, as promoters, informers, and the like, severely punished, for a warning to all others that shall dare [on any pretence whatsoever] infringe our *English* liberties*. For so the lord † *Coke* having [elsewhere] with detestation mentioned their story, pathetically concludes; "*Qui eorum vestigiis insistant, exitus perhorrescant.*" "Let all those who shall presume to tread their steps, tremble at their dreadful end." Other instances of a latter date might be given, but I suppose these may suffice.

Jurym. Yes, surely; ‡ and by what you have discoursed of the long-continued use of Juries, and the zealous regards our ancestors had not to part with them, I perceive that they were esteemed a special privilege. Be pleased, therefore, to acquaint me, wherein the excellency and advantages to the people, by that method of trial above others, may consist.

Barr. This question shews you have not been much conversant abroad; to observe the miserable condition of the poor people in most other nations where they are either wholly subject to the despotic arbitrary lust of their rulers; or at best under such laws as render their lives, liberties, and estates, liable to be disposed of at the discretion of strangers appointed their judges: most times mercenary, and creatures of prerogative; sometimes malicious and oppressive; and often partial and corrupt. Or suppose them ever so just and upright, yet still

*See Sir *Rich. Baker's Chron.* p. 254, printed in 1674:

† 4 part *Institut. fol.* 41.

‡ The Jurymen having been intrusted in the antiquity of Juries, is now going to enquire wherein their advantage consists. The Barrister accordingly shews the benefits which may arise from them. Thus the author performs the second part of what he proposed in the title-page.

§ See all this excellently made out, and more at large, by the *L. C. J. Fortescue*, afterwards chancellor to *K. Hen. VI.* in his book *De laudibus Legum Angliæ*, cap. 26, 27, 28, 29.

still has the subject no security against the attacks of unconscionable witnesses. Yea, where there is no sufficient evidence, upon bare suspicions, they are obnoxious to the tortures of the rack, which often make an innocent man confess himself guilty, merely to get out of present pain. Is it not then an inestimable happiness to be born, and live under such a mild and righteous constitution, wherein all these mischiefs (as far as human prudence can provide) are prevented? where none can be condemned, either by the power of superior enemies, or the rashness or ill-will of any judge, nor by the bold affirmations of any profligate evidence: but no less than twelve honest, substantial, impartial men, his neighbours (who consequently cannot be presumed to be unacquainted either with the matters charged, the prisoner's course of life, or the credit of the evidence) must first be fully satisfied in their consciences, that he is guilty; and so all unanimously pronounce him upon their oaths? Are not these, think you, very material privileges?

Jurym. Yes, certainly; though I never so well considered them before, But now I plainly see our forefathers had, and we still have, all the reason in the world to be zealous for the maintenance and preservation thereof from subversion or encroachments, and to transmit them entire to posterity. For, if once this bank be broken down or neglected, an ocean of oppression, and the ruins of infinite numbers of people, (as in *Empson* and *Dudley's* days) may easily follow, when on any pretence they may be made criminals, and then fined in vast sums, with pretext to enrich the king's coffers, but indeed to feed those insatiate vultures that promote such unreasonable prosecutions. But since you have taught me so much of the antiquity and excellency of juries, I cannot but crave the continuance of your favour, to acquaint me somewhat more particularly of their office and power by law.

Barr. ‡ I shall gladly comply with so reasonable and just a request. † "A jury of twelve men are by our laws the only proper judges of the matter in issue before them." As for instance,

1. That testimony which is delivered to induce a jury to believe, or not to believe, the matter of fact in issue, is called in law EVIDENCE; because thereby the jury may, out of many matters

‡ The author now proceeds to the execution of the third and last part of his proposed plan.

† See *Coke*, 4th part of *Instit* fol. 84.

matters of fact, *Evidere veritatem*; that is, see clearly the truth, of which they are proper judges,

2. When any matter is sworn, or [when a] deed [is] read or offered, whether it shall be believed, or not, or whether it be true, or false, in point of fact, the jurors are proper judges.

3. Whether such an act was done, in such, or such a manner, or to such, or such, an intent, the jurors are judges. For the court is not judge of these matters, which are evidence to prove, or disprove, the thing in issue. And therefore the witnesses are always ordered to direct their speech to the jury, they being the proper judges of their testimony. And in all pleas of the crown [or matters criminal] the prisoner is said "to put himself for trial upon his country;" which is explained and referred by the clerk of the court, to be meant of the jury, saying to them, "Which country you are."

Jurym. Well then, what is the part of the king's justices, or the court? what are they to take cognizance of, or do, in the trial of mens, lives, liberties, and properties?

Barr. Their office, in general, is to do equal justice and right: particularly,

1. To see that the jury be regularly returned and duly sworn.
2. To see that the prisoner [in cases where it is permissible] be allowed his lawful challenges.
3. To advise by law, whether such matter may be given in evidence, or not; such a writing read, or not; or such a man admitted to be a witness, &c.
4. Because by their learning, and experience, they are presumed to be best qualified to ask pertinent questions, and, in the most perspicuous manner, soonest to sift out truth from amongst tedious impertinent circumstances and tautologies: they therefore commonly examine the witnesses in the court: yet not excluding the jury, who of right may, and, where they see cause, ought to ask them any necessary questions; which undoubtedly they may lawfully do with modesty and discretion, without begging any leave. For if asking leave be necessary, it implies in the court a right when they list to deny it; and how then shall the jury know the truth? And since we see, that council, who too often (*—Pudet hæc opprobria nobis, &c.**)

for

**Pudet hæc opprobria nobis, et dici potuisse et non potuisse refelli.*"
 "We are ashamed, that these disgraceful things can be said and cannot be refuted." It is by no means uncommon for the Council to misrepresent matters of law, as well as matters of fact, in the course of their pleadings. So that the Jury should place little dependence on what falls from them;—They are not upon oath.

for their fees strive only to baffle witnesses, and stifle truth, take upon them daily to interrogate the evidence; it is absurd to think that the Jurors should not have the same privilege, who are upon their oaths and proper judges of the matter.

"5. As a discreet and lawful assistant to the Jury"* they do often recapitulate and sum up the heads of the evidence: but the Jurors are still to consider whether it be done truly, fully and impartially; for one man's memory may sooner fail than twelve's. He may likewise state the law to them; that is, deliver his opinion where the case is difficult, or they desire it. But since, "*ex facto jus oritur*," "*all matter of law arises out of matter of fact*," so that till the fact is settled there is no room for law: therefore all such discourses of a judge to a jury are, or ought to be, hypothetical, not coercive; conditional, and not positive: viz. "It you find the fact thus, or thus" (still leaving the Jury at liberty to find as they see cause) "then you are to find for the plaintiff; but if you find the fact thus, or thus, then you are to find for the defendant, or the like;" guilty, or not guilty, in cases criminal.

Lastly, they are to take the verdict of the Jury, and thereupon to give judgement according to law. For the office of a judge [as Coke well observes is "*jus dicere*," not "*jus dare*" "*not to make any laws by strains of wit, or forced interpretations; but plainly, and impartially to declare the law already established*." Nor can they refuse to accept the Jury's verdict when agreed: for if they should, and force the Jury to return, and any of them should miscarry for want of accommodation, it would undoubtedly be murder; and in such case the Jury may, without crime, force their liberty; because they are illegally confined, [having given in their verdict, and thereby honestly discharged their office, and are not to be starved for any man's pleasure.

Jurym. But I have been told, that a Jury is only judge of naked *matter of fact*, and are not at all to take upon them to meddle with, or regard, *matter of law*, but leave it wholly to the court.

Barr. 'Tis most true, Jurors are judges of matters of fact; that is their proper province, their chief business; but yet not excluding the consideration of matter of law, as it arises out of, or is complicated with and influences the fact. For to say, they are not at all to meddle with, or have respect to, law in giving their verdicts, is not only a false position, and contradicted by every day's experience; but also a very dangerous and pernicious one; tending to defeat the principal end of the institution of Juries, and so subtilly to undermine that which was too strong to be battered down.

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1. Is

* *Vaughan's Reports in Bushel's case, fol. 144.*

1. It is false : For, though the direction, as to matter of law separately, may belong to the judge, and the finding the matter of fact does, peculiarly, belong to the Jury ; yet must your Jury also apply matter of fact and law together ; and from their consideration of, and a right judgement upon both, bring forth their verdict : For do we not see in most general issues, as upon not guilty—pleaded in trespass, breach of the peace, or felony, though it be *matter in law* whether the party be a *trespasser*, a breaker of the peace, or a felon : yet the Jury do not find the fact of the case *by itself*, leaving the law to the court ; but find the party guilty, or not guilty, *generally* ? So as, though they answer not to the question *singly*, what is law ? yet they determine the law, in all matters, where *issue is joined*. So likewise is it not every day's practice, that when persons are indicted for murder, the Jury not only find them guilty, or not guilty ; but many times, upon hearing, and weighing of circumstances bring them in, either guilty of murder, manslaughter, *per infortunium* or *se defendendo*, † as they see cause ? Now do they not, herein, complicate both law and fact ? And to what end is it, that when any person is prosecuted upon any statute, the statute itself is usually read to the Jurors, but only that they may judge, whether, or no, the matter be within that statute ? But to put the business out of doubt, we have the suffrage of that oracle of law, *Littleton*, who in his tenures, sect. 368. declares, “ *That if a Jury will take upon them the knowledge of the law upon the matter, they may.* ” Which is agreed to likewise by *Coke* in his comment thereupon † And therefore it is false to say that the Jury hath not power, or doth not use frequently to apply the fact to the law ; and thence taking their measures, judge of, and determine, the crime, or issue, by their verdict*.

2. As

† By misfortune or in self defence.

† Blackstone considers this, as a settled and allowed rule. See his Commentaries, vol. I p. 8. vol. III. p. 377, 378. particularly vol. IV. p. 354, 355. 4th ed.

* Not only the express assertion of lawyers—and the practice of the courts, prove that Juries are authorized to determine the law, so far as it relates to the fact ; but, in the third place, the words, in which verdicts must be given, indicate, that they have this power. If Juries had been appointed to judge of fact only, the words done,” or “not done,” or words of a like import, would have been substituted for the words “guilty,” or “not guilty.” However, as our ancestors have placed it in their option to determine the law, so far as it is connected with the fact ; the language

2. As Juries have ever been vested with such power by law, so, to exclude them from, or disseise them of the same, were utterly to defeat the end of their institution †. For then, if a person should be indicted for doing any common innocent act, if it be but clothed, and disguised, in the indictment, with the name of treason, or some other high crime, and proved, by witnesses, to have been done by him: the Jury, though satisfied in conscience, that the fact is not any such offence as it is called, yet because [according to this fond opinion] they have no power to judge of law, and the fact charged is fully proved, they shall, at this rate, be bound to find him guilty: And being so found, the judge may pronounce sentence against him, for he finds him a convicted traitor, &c. by his peers. And thus, as a certain physician boasted, that he had killed one of his patients with the best method in the world; so here should we have an innocent man hanged, drawn, and quartered, and all according to law.

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Jury.

† From the doctrine, that Juries, in the case of libels, are not judges of law, as well as fact, necessarily flows the following absurdity; viz. that it is the duty of Juries to declare men guilty, or not guilty, in whom they perceive neither guilt or innocence. —Again: If, because a circumstance is established as a fact, it is to be reputed as a crime, every incident which happens is a crime. Now if printing and publishing only be criminal, it is criminal to print and publish the Book of Common Prayer, and the Bible.

It is hard to say, on what principles this right of Juries can be disputed. “If Jurymen, because not bred to the law; are supposed incapable of knowing what is, or what is not, law; it follows that none but lawyers can justly be punished for a breach of the law; for, surely, that man is rather unfortunate, than faulty, who ignorantly transgresses the law.”—Besides, if it is wise to vest the determination of law, where it concerns facts, in the Jury, when any civil or criminal suit is in question! certainly it is wise to entrust the Jury with the same power, in all suits which particularly concern the state: because, in such suits, the determination is always of more consequence, and judges are more likely to be under an influence, which is injurious to the rights of the people.

language of their verdicts comprehends, when necessary, their sentiments upon both. If an action is said to be criminal, it is necessary to determine whether the action happened;—So that when a Jury declares that a man is guilty, the fact is implied: because they cannot affix guilt, where there is no fact. When a Jury declares a man not guilty, the determination of the fact is left uncertain: because it is unnecessary: for the law concerns itself with actions, only so far, as they are criminal.

Jurym. God forbid that any such thing should be practised! and indeed I do not very fully understand you.

Barr. I do not say it ever *hath been*, and I hope it never *will be* practised. But this I will say, that according to this doctrine, it *may be*; and consequently Juries may thereby be rendered, rather a snare, or engine of oppression, than any advantage, or guardian of our legal liberties against arbitrary injustice; and made mere properties to do the drudgery, and bear the blame of unreasonable prosecutions. And since you seem so dull as not to perceive it, let us put an imaginary case; not in the least to abet any irreverence towards his Majesty, but only to explain the thing, and shew the absurdness of this opinion — Suppose then a man should be indicted, For that he as a false traitor, not having the fear of God before his eyes, &c. did traitorously, presumptuously, against his allegiance, and with an intent to affront his Majesty's person, and government, pass by such or such, a royal statue, or effigies, with his hat on his head, to the great contempt of his Majesty and his authority, the evil example of others, against the peace, and his Majesty's crown and dignity. Being hereupon arraigned, and having pleaded not guilty, suppose that sufficient evidence should swear the matter of fact laid in the indictment, *viz.* That he did pass by the statue, or picture, with his hat on; now imagine yourself one of the Jury that were sworn to try him; — what would you do in the matter?

Jurym. Do? why I should be satisfied in my conscience, that the man had not, herein, committed any crime, and so I would bring him in, not guilty.

Barr. You speak as any honest man would do; but I hope you have not forgot the point we were upon. Suppose therefore, when you thought to do thus, the court, or one of your brethren, should take you up, and tell you, that it was out of your power so to do: “For look ye (saith he) my masters! we
 “ Jurymen are only to find matter of fact; which being fully
 “ proved, as in this case before us it is, we must find the party
 “ guilty. Whether the thing be treason, or not, does not be-
 “ long to us to enquire; it is said so here, you see, in the in-
 “ dictment; and let the court look to that, they know best.
 “ We are not judges of law. Shall we meddle with niceties
 “ and punctillio's, and go contrary to the directions of the
 “ court? So perhaps we shall bring ourselves into a *Præmunire*
 “ (as they say) and perhaps never be suffered to be Jurymen
 “ again. No, no, the matter of fact you see is proved, and
 “ that is our business; we must go according to our evidence

we

" we cannot do less; truly it is something hard and I pity the poor man, but we cannot help it, &c." After these notable documents, what would you do now?

Jurym. I should not tell what to say to it; for I have heard several ancient Jurymen speak to the very same effect, and thought they talked very wisely.

Barr. Well then, would you consent to bring in the man guilty?

Jurym. Truly I should be somewhat unwilling to do it; but I do not see which way it can be avoided, but that he must be found guilty of the fact.

Barr. God keep every honest body from such Jurymen! Have you no more regard to your Oath? to your Conscience? to Justice? to the life of a man?

Jurym. Hold! hold! perhaps we would not bring him in guilty generally, but only guilty of the fact*; finding no more, but guilty of passing by the statue with his hat on.

Barr. This but poorly mends the matter, and signifies little or nothing; for such a finding hath generally been refused by the court, as being no verdict; though, it is said, it was lately allowed somewhere in a case that required favour. But, suppose it were accepted, what do you intend should become of the prisoner? Must not he be kept in prison till all the judges are at leisure, and willing, to meet, and argue the business? Ought you not, and what reason can you give why you should not, absolutely acquit, and discharge him? Nay, I do aver, you are bound, by your oaths, to do it; by saying with your mouths to the court, what your conscience cannot but dictate to yourselves, "*not guilty.*" For pray consider, are you not sworn, That you will well and truly try, and true deliverance† make? There is none of this story, of matter of fact, distinguished from law, in your oath; but you are, "well," that is, *fully*, and "truly," that is, *impartially*, to try the prisoner. So that if upon your consciences, and the best of your understanding, by what is proved against him, you find he is guilty of that crime wherewith he stands charged, that is, deserving Death, or such other punishment as the law inflicts upon an offence so denominated; then you are to say, he is guilty. But if you are not satisfied, that either the act he has committed, was *treason*
or

* Is not this exactly similar to a late verdict given in the case of the King against *Eaton*, as well as many other verdicts lately given.

† Of their *verdict*, this is meant.

or other crime, (though it be ever so often called so); or that the act itself, if it were so criminal, *was not done*: then what remains, but, that you are to acquit him? for the end of Juries is to preserve men from oppression; which may happen, as well by imposing, or ruining them for that as a crime, which indeed is none, or at least not such, or so great, as is pretended; as by charging them with the commission of that, which, in truth, was not committed. And how do you well, and truly try, and true deliverance make, when indeed you do but deliver him up to others to be condemned, for that, which yourselves do not believe to be any crime?

Jurym. Well; but the supposed case is a case un-supposable. It is not to be imagined, that any such thing should happen; nor to be thought, that the judges will condemn any man, though brought in guilty by the Jury, if the matter, in itself, be not so criminal by law.*

Barr.

* Had the jurymen lived at this day he could not have entertained this opinion. As one instance out of many we will briefly mention that of William Carter, a Bill Sticker, who could neither write or read; He was accused of publishing a false, scandalous and seditious libel:—The Attorney General instead of proving the falsehood, entered into a declamation on the evil tendency of libels, at the same time assuring the Jury he was sensible the Prisoner was not a proper object of severity; that he wished for a Verdict, only for the sake of deterring others, and that he would apply to the Court that a nominal punishment only should be inflicted.

The Jury suffered themselves to be prevailed on to give a Verdict of Guilty—Then following as a nominal punishment, Six months imprisonment, and security for £ 200.—viz. himself in £ 100. and two securities £ 50. each—How did the Jury fulfill their oaths?

Nothing can be clearer than the duty of Jurymen as defined by Magna Charta:—Wherever the statute law has not provided a specific punishment for any crime, it is the duty of the Jury to determine the extent of the punishment:—The practice of leaving that to the Court is a desertion of their duty and repugnant to the principles of the Constitution.

The words of Magna Charta are, That no Freeman shall be amerced for a small fault, but after the manner of his fault, and for a great fault after the greatness thereof; saving to him his contentment, and a merchant, saving to him his merchandize; and none of the said amerciaments shall be imposed, but by the oaths of honest and lawful men of the vicinage.—Thus our Forefathers not only prevented a Judge from imposing the fine, but likewise tied up the hands of the Jury from ruining a man by an excessive fine;—in all cases reserving to the criminal the means of a future livelihood.

Barr. It is most true, I do not believe that ever that case will happen. I put it in a thing of apparent absurdity, that you might the more clearly observe the unreasonableness of this doctrine; but withal I must tell you, that it is not impossible that some other cases may really happen, of the same, or the like nature, though more fine, and plausible. And, though we apprehend not, that during the reign of his Majesty that now is, (whose life God long preserve) any judges will be made, that would so wrest the law; yet what security is there, but that some successors may not be so cautious in their choice? and, though our benches of judicature be at present furnished with gentlemen of great integrity, yet, there may one day happen some *Tresilian*, or kinsman of *Empson's* to get in, (for what has been, may be) who *Empson*-like too, shall pretend it to be for his master's service to encrease the number of criminals, that his coffers may be filled with fines, and forfeitures: and then such mischiefs may arise. And Juries, having upon confidence parted with their just privileges, shall then, too late, strive to reassume them, when the number of ill precedents shall be vouched to enforce that as of right, which in truth was at first a wrong, grounded on easiness and ignorance. Had our wise, and wary ancestors, thought fit to depend so far upon the contingent honesty of judges, they needed not to have been so zealous to continue the usage of Juries.

Jurym. Yet still I have heard, that in every indictment, or information, there is always something of form, or law, and, something else, of fact; and it seems reasonable, that the Jury should not be bound up nicely to find every formality therein expressed, or else to acquit (perhaps) a notorious criminal. But if they find the essential matter of the crime, then they ought to find him guilty.

Barr. You say true, and therefore must note, that there is a wide difference to be made between words of course, raised by implication of law, and essential words, that either make, or really aggravate, the crime charged. The law does suppose and imply every trespass, breach of the peace, every felony, murder, or treason, to be done VI ET ARMIS, with force, and arms. &c. Now, if a person be indicted for murder by poison, and the matter proved; God forbid the Jury should scruple the finding him guilty upon the indictment, merely because they do not find that part of it, as to force, and arms, proved! for that is implied as a necessary, or allowable, fiction of law.

But on the other side, when the matter in issue, in itself, and taken as a naked proposition, is of such a nature, as no action

indictment, or information will lie for it singly; but it is worked up by special aggravation into matter of damage, or crime; (as that it was done to scandalize the government to raise sedition, to affront authority, or the like, or with such, or such, an evil intent): If these aggravations, or some overt act to manifest such ill design, or intention, be not made out by evidence, then ought the Jury to find the party, not guilty. For Example.

Bishop *Latimer* (afterwards a martyr in bloody queen *Mary's* days, for the Protestant religion) in his sermon preached before the most excellent King *Edward VI.* delivered these words: "I must desire your grace to hear poor men's suits yourself. The saying is now, "That money is heard every where"—"If he be rich, he shall soon have an end of his matter." Others are fain to go home with weeping tears for any help they can obtain at any judge's hand. Hear men's suits yourself, I require you in God's behalf; and put them not to the hearing of these velvet-coats, these up-skips. Amongst all others, one especially moved me at this time to speak: This it is, Sir: A gentlewoman came and told me, that a great man keepeth certain lands of hers from her, and will be her tenant in spite of her teeth. And that in a whole twelve-month she could not get but one day for the hearing of her matter, and the same day, when it should be heard, the great man brought on his side a great sight of lawyers for his council. The gentlewoman had but one man of law, and the great man shakes him so, that he cannot tell what to do. So that when the matter came to the point, the judge was a means to the gentlewoman, that she should let the great man have a quietness in her land.—I beseech your grace, that ye would look to these matters.

"And you proud judges! hearken what God saith in his holy book; *Audite illos, ut parvum, ut magnum*, Hear them [saith he] the small as well as the great; the poor as well as the rich; regard no person, fear no man. And why? *Quia Domini judicium est*, The judgement is God's. Mark this saying, thou proud judge; the devil will bring this sentence against thee at the day of doom. Hell will be full of these judges if they repent not, and amend: they are worse than the wicked judge that Christ speaketh of, *Luke* the 19th, that neither feared God, nor the world. Our judges are worse than this judge was; for they will neither hear men for God's sake, nor fear of the world, nor importunateness, nor any thing

" thing else; yea, some of them will command them to * ward it they be importunate.—I heard say, that when a suitor came to one of them, he said, " What fellow is it, that giveth these folks council to be so importunate? He deserves to be punished, and committed to ward." Marry, Sir, punish me then; it is even I that gave them council. I would gladly be punished in such a cause; and if you amend not, I will cause them to cry out upon you still; even as long as I live."

—These are the very words of that good bishop, and martyr, father *Latimer*: " But now-a-days the judges be afraid to hear a poor man against the rich; insomuch, they will either pronounce against him, or so drive off the poor man's suit, that he shall not be able to go through with it." †

Jurym. Truly they are somewhat bold, but I think very honest ones. But what signify they to our discourse?

Barr. Only this;—Suppose the judges of those times, thinking themselves aggrieved by such his freedom, should have brought an indictment, against him, setting forth, that " falsly and maliciously, intending to scandalize the government, and the administration of justice, in this realm, and to bring the same into contempt, he did speak, publish, and declare the false, and scandalous, words before recited."

Jurym. I conceive, the judges had more wit, than to trouble themselves about such a business.

Barr. That is nothing to the purpose; but suppose, I say, by them, or any body else, it had been done; and his speaking the words had been proved; and you had then been living, and one of the Jury?

Jurym. I would have pronounced him not guilty, and been starved to death before I would have consented to a contrary verdict; because the words in themselves are not criminal, nor reflecting upon any particulars; and as for what is supposed to be laid in the indictment, or information, (" that they were published, or spoken, to scandalize the government, and the administration of justice, or to bring the same into contempt") nothing of that appears.

Barr. You resolve, as every honest, understanding, conscientious man, would do in the like case; for when a man is prosecuted for that, which, in itself, is no crime, how dreadfully soever it may be set out, (as the inquisitors in *Spain* use to clothe innocent Protestants, whom they consign to the flames, with *Sambenito's*, garments all over bepainted with Devils; that the people beholding them in so hellish a dress, may be so

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far

* Prison.

† See also *Latimer's Third Sermon*.

far from pitying them, that they may rather condemn them in their thoughts as miscreants not worthy to live, though in truth they know nothing of their cause;)—yet I say, notwithstanding any such bugbear artifices, an innocent man ought to be acquitted, and not he and all his family ruined, and perhaps utterly undone, for words, or matters, harmless in themselves, and possibly very well intended, but only rendered criminal, by being thus hideously dressed up, and wrested with some far-fetched, forced, and odious construction.

Jurym. This is a matter well worthy the consideration of all Juries; for indeed I have often wondered to observe the adverbs in declarations, indictments, and informations, in some cases to be harmless vinegar and pepper, and in others, henbane steeped in *aqua fortis*.

Barr. That may easily happen where the Jury does not distinguish legal implications, from such as constitute, or materially aggravate, the crime: for If the Jury shall honestly refuse to find the latter in cases where there is no direct proof of them, (*viz.* That such an act was done falsely, scandalously, maliciously, with an intent to raise sedition, defame the government, or the like,) their mouths are not to be stopt, nor their consciences satisfied with the court's telling them—You have nothing to do with that; it is only matter of form or matter of law; you are only to examine of fact, whether he spoke such words, wrote, or sold, such a book, or the like. For now, if they should ignorantly take this for an answer, and bring in the prisoner guilty, though they mean and intend of the naked fact, or bare act only; yet the clerk recording it, demands a further confirmation, saying to them, thus; “ Well then, you say *A. B.* is guilty of the trespass, or misdemeanour, in manner and form, as he stands indicted; and so you say all?” To which the foreman answers for himself and his fellows, “ Yes.” Whereupon the verdict is drawn up — “ *Juratores super sacramentum suum dicunt, &c.*” “ The Jurors do say upon their oaths “ that *A. B.* maliciously, in contempt of the king and the government, with an intent to scandalize the administration of “ justice, and to bring the same into contempt, or to raise sedition, &c.” (as the words before were laid); spake such words, published such a book, or did such an act, against the peace of our lord the king, his crown and dignity.

Thus a VERDICT, so called in law, *quasi veritatis*, because it ought to be the voice, or saying, of TRUTH † itself may become

† *Vere dictum.* Truly spoken.

come composed in its material part of falshood. Thus twelve men ignorantly drop into a perjury. And will not every conscientious man tremble to pawn his soul under the sacred, and dreadful solemnity of an oath, to attest, and justify, a lye upon record to all posterity? besides the wrong done to the prisoner, who thereby perhaps comes to be hanged, (and so the Jury* *in foro conscientiae* are certainly guilty of this murder;) or at least by fine, or imprisonment, undone, with all his family, whose just curse will fall heavy on such unjust Jurymen, and all their posterity, that against their oaths, and duty, occasioned their causeless misery. And is all this, think you, nothing but a matter of formality?

Jurym. Yes, really, a matter of vast importance, and sad consideration; yet I think you charge the mischiefs done by such proceedings a little too heavy upon the Jurors. Alas, good men! they mean no harm: they do but follow the directions of the court: if any body ever happen to be to blame in such cases, it must be the judges.

Barr. Yes, foresooth! that's the Jurymen's common plea; but do you think it will hold good in the court of Heaven? 'Tis not enough that we mean no harm, but we must do none neither; especially in things of that moment. Nor will ignorance excuse, where it is affected, and where duty obliges us to inform ourselves better, and where the matter is so plain and easy to be understood.

As for the judges, they have a fairer plea than you, and may quickly return the burthen back upon the Jurors: For "we," may they say, "did nothing but our duty, according to usual practise: the Jury, his peers, had found the fellow guilty, upon their oaths, of such an odious crime, and attended with such vile presumptions, and dangerous circumstances. They are judges: we took him as they presented him to us; and according to our duty pronounced the sentence, that the law inflicts in such cases, or set a fine, or ordered corporeal punishment upon him, which was very moderate, considering the crime laid in the indictment, or information, and of which they had so sworn him guilty. If he were innocent, or not so bad as represented, let his destruction lie upon the Jury, &c." At this rate, if ever we should have an uncon-

scionable judge, might he argue, and thus the guilt of the blood or ruin, of an innocent man, when it is too late, shall be bandied to and fro, and shuffled off from the Jury to the Judge, and

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* In the Tribunal of conscience.

from the Judge to the Jury; but really sticks fast to both, but especially on the Jurors: because the very end of their institution was to prevent all dangers of such oppression; and in every such case, they do not only wrong their own souls, and irreparably injure a particular person, but also basely betray the liberties of their country in general. For as, *without* their ill compliance and act, no such mischief can happen;—so *by* it, ill precedents are made, and the plague is increased; honest Juries are disheartened, or seduced by custom from their duties; just privileges are lost by disuse; and perhaps within a while some of themselves may have an hole picked in their coats, and then they are tried by another Jury just as wise, and honest, and so deservedly come to smart under the ruining effects, and example, of their own folly and injustice.

Jurym. You talk of folly, and blame Jurymen, when indeed they cannot help it. They would sometimes find such a person guilty, and such a one innocent, and are persuaded they ought so to do; but the court over-rules, and forces them to do otherwise.

Barr. How, I pray?

Jurym. How? why, did you never hear a Jury threatened to be fined and imprisoned, if they did not comply with the sentiments of the court?

Barr. I have read of such doings, but I never heard or saw it done: and indeed I do not doubt but our seats of justice are furnished with both better men, and better lawyers, than to use any such menaces, or dures; for undoubtedly it is a base, and very illegal practice. But, however, will any man that fears God, nay, that is but an honest heathen, debauch his conscience and forswear himself; do his neighbour injustice; betray his country's liberties, and consequently enslave himself, and his posterity; and all this merely, because he is hedged, and threatened a little?

Jurym. I know it should not sway with any: but alas! a prison is terrible to most men, whatever the cause be; and the fine may be such, if one shall refuse to comply, as may utterly ruin one's family.

Barr. Fright not yourself; there is no cause for this ague-fit, to shake your conscience out of frame: if you are threatened, 'tis but "*brutum fulmen*" "lightning without a thunder-bolt," nothing but big words; for it is well known, THAT THERE IS NEVER A JUDGE IN ENGLAND THAT CAN FINE, OR IMPRISON, ANY JURYMAN IN SUCH A CASE

Jurym.

Jurym. Good, Sir! I am half ashamed to hear a Barrister talk thus: have not some in our memory been fined and imprisoned? And sure that which has actually been done, is not altogether impossible.

Barr. Your servant, Sir! under favour of your mighty wisdom, and experience, when I said no Judge could do it, I spake the more like a Barrister; for it is a maxim in law — *Id possumus, quod Jure possumus*; “a man is said to be able to do only so much, as he may lawfully do.” But such fining, and imprisoning, cannot lawfully be done; the judges have no right, or power, by law, to do it; and therefore it may well be said, they cannot, or are not able, to do it.

And whereas you say, that some Juries in our memory have been fined and imprisoned, you may possibly say true; but it is as true, that it hath been only in our memory; for no such thing was practised in antient times; for so I find it asserted by a late learned judge*, in these positive words; “No case can be offered, either before attainments granted in general, or after, that ever a Jury was punished by fine and imprisonment by any Judge, for not finding according to their evidence, and his direction, until *Popham’s* time; nor is there clear proof, that he ever fined them for that reason, seperated from other misdemeanours.” And fol. 152. he affirms, “That no man can shew, that a Jury was ever punished upon an information, either at law, or in the Star-chamber, where the charge was only for finding against their evidence, or giving an untrue verdict; unless imbracery, subornation, or the like were joined.” So that, you see, the attempt is an innovation, as well as unjust; a thing unknown to our fore-fathers, and the antient sages of the law: and therefore so much the more to be watched against, resisted, and suppressed, whilst young; lest in time this crafty cockatrice’s egg, hatched, and fostered by ignorance, and pusillanimous compliance, grow up into a serpent too big to be mastered, and so blast, and destroy the first-born of our *English* freedoms. And indeed (blessed be God) it hath hitherto been rigorously opposed as often as it durst crawl abroad; being condemned in parliament, and knocked o’th’ head by the resolutions of the judges upon solemn argument: as by and by, I shall demonstrate.

Jurym. Well, but are Jurors not liable then to fine or imprisonment, in any case whatsoever?

Barr. Now you run from the point; we were talking of giving their verdict, and you speak of any case whatsoever.

Whereas

* Lord chief justice *Faughan*, in his Reports, fol. 146.

Whereas you should herein observe a necessary distinction, which I shall give you in the words of that learned judge last recited*: "Much of the office of Jurors, in order to their verdict, is MINISTERIAL; as not withdrawing from their fellows after they are sworn; not receiving from either side evidence not given in court; not eating and drinking before their verdict; refusing to give a verdict, &c. wherein if they transgress, they may be finable. But the verdict itself, when given, is not an act ministerial, but JUDICIAL, and (supposed to be) according to the best of their judgement; for which they are not finable, nor to be punished, but by attain; that is, by another Jury, in cases where an attain lies, and where it shall be found that, wilfully, they gave a verdict, false and corrupt.

Now that Juries, otherwise, are in no case punishable, nor can (for giving their verdict according to their consciences, and the best of their judgement) be legally fined or imprisoned by any judge, on colour of not going according to their evidence, or finding contrary to the directions of the court; is a truth, both founded on unanswerable reasons, and confirmed by irrefragable authorities.

Jurym. Those I would gladly hear.

Barr. They are many, but some of the most evident are these that follow. As for reasons:

1. A Jury ought not to be fined, or imprisoned, because they do not follow the judge's directions; for if they do follow his directions, they may yet be attainted: and to say they gave their verdict according to his directions, is no bar but the judgement shall be reversed, and they punished for doing that which if they had not done, they should (by this opinion) have been fined, and imprisoned, by the judge.—Which is unreasonable.
2. If they do not follow his direction, and be therefore fined, they may be attainted, and so they should be doubly punished by distinct judicatures for the same offence; which the common law never admits.
3. To what end is the Jury to be returned out of the vicinage (that is, the neighbourhood) whence the issue ariseth? to what end must hundredors be of the Jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general? to what end are they challenged so scrupulously to the array and poll? to what end must they have such

such a certain freehold, and be *probi, & legales, homines*,* and not of affinity with the parties concerned, &c. if after all this, they implicitly must give a verdict by the dictates, and authority of another man, under pain of fines, and imprisonment, when sworn to do it according to the best of their own knowledge? A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude, or inter, the thing to be resolved by another's understanding, or reasoning; unless all men's understandings were equally alike. And if, merely in compliance, because the judge says thus, or thus, a Jury shall give a verdict; tho' such their verdict should happen to be right, true, and just; yet they being not assured it is so from their own understanding, are *foresworn*, at least in *foro conscientia* †

4. Were Jurors so finable, then every mayor, and bailiff of corporations, all stewards of leets, justices of peace, &c. whatever matters are tried before them, shall have verdicts to their minds, or else fine, and imprison the Jurors till they have; so that such must be either pleased, humoured, or gratified, else no justice, or right, is to be had in any court.

5. Whereas a person by law may challenge the sheriff, or any Jurymen, if of kin to his adversary; yet he cannot challenge a mayor, recorder, justice, &c. who 'tis possible will have a verdict for their kinsman, or against their enemy, or else fine and imprison the Jury till they have obtained it: so that by this means our lives, liberties, and properties, shall be solely tried by, and remain at the arbitrary disposal of every mercenary, or corrupted justice, mayor, bailiff, or recorder, if any such should, at any time, get into office.

6. 'Tis unreasonable that a Jury should be finable on pretence of their going against their evidence; because it can never be tried, whether or no in truth they did find with, or against, their evidence, by reason no writ of error lies in the case.

7. Were Jurymen liable to such arbitrary fines, they would be in a worse condition than the criminals that are tried by them; for in all civil actions, informations, and indictments, some appeals, or writs of false judgement, or of error, do lie into superior courts to try the regular proceedings of the inferior. But here can be no after-trial, or examination; but the jurymen (if fining at all were lawful) must either pay the fine, or lie by it; without remedy to decide, whether in his particular case he were legally fined, or not.

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* Honest and lawful men.

† In the tribunal of conscience.

8. Without a fact agreed, it is as impossible for a judge, or any other, to know the law, relating to that fact, or direct concerning it, as to know an accident that hath no subject; for as, where there is no law, there is no transgression, so where there is no transgression, there is no place for law: for "the law" (saith divine authority) "is made for the transgressor." And as Coke tells us, *Ex facto jus oritur*; "upon stating the fact, or transgression, matter of law doth arise, or grow out of the root of the fact." Now the Jury being the sole judges of fact and matter in issue before them, not finding the fact on which the law should arise, cannot be said to find against law, which is no other than a superstructure on fact: so that to say they have found against the law, when no fact is found, is absurd; an expression insignificant, and unintelligible. For no issue can be joined of matter in law; no Jury can be charged with the trial of matter in law barely; no evidence ever was, or can be, given to a Jury, of what is law, or not: nor can any such oath be given to, or taken by a Jury, to try matter in law; nor does an attain lie for such oath, if false, &c. But if, by finding against the directions of the court in matter of law, shall be understood, that if the judge having heard the evidence given in court, (for he can regularly know no other, though the Jury may) shall tell the Jury upon this evidence, the law is for the plaintiff, or for the defendant, and the Jury are, under pain of fine, and imprisonment, to find accordingly; then it is plain, the Jury ought of duty so to do. Now if *this were true*, who sees not that the Jury is but a troublesome delay, of great charge, much formality, and no real use in determining right, and wrong, but mere echoes to sound back the pleasure of the court; and consequently, that trials by them might be better abolished than continued? which is at once to spit folly in the faces of our venerable ancestors, and enslave our posterity.

9. As the judge can never direct what the law is in any matter controverted, without first knowing the fact; so, he cannot, possibly, know the fact but from the evidence which the Jury have: but he can never fully know what evidence they have; for besides what is sworn in court, (which is all that the judge can know) the Jury, being of the neighbourhood, may, and oft-times do, know something of their own knowledge, as to the matter itself, the credit of the evidence, &c. which may justly sway them in delivering their verdict; and which self-knowledge of theirs is so far countenanced by law, that it supposes them capable thereby to try the matter in issue,

(and

and so they must) though no evidence were given, on either side, in court. As when any man is indicted, and no evidence comes against him, the direction of the court always is, "You are to acquit him, unless of your own knowledge you know him guilty;" so that even, in that case, they may find him guilty, without any witnesses. Now how absurd is it to think, that any judge has power to fine a Jury for going against their evidence, when he that so fineth, knoweth perhaps nothing of their evidence at all, (as in the last case) or at least but some part of it? For how is it possible he should lawfully punish them for that which it is impossible for him to know?

Lastly. Is any thing more common, than for two lawyers, or judges, to deduce contrary, and opposite conclusions out of the same case in law? And why then may not two men infer distinct conclusions from the same testimony? And consequently, may not the Judge, and Jury, honestly differ in their opinion, or result from the evidence, as well as two judges may which often happens? And shall the Jurymen, merely for this difference of apprehension, merit fine, and imprisonment, because they do that which they cannot otherwise do, preserving their oath and integrity? especially when by law they are presumed to know better, and much more of the business, than the judge does, as aforesaid.

Are not all these, gross contradicting absurdities, and unworthy (by any man that deserves a gown) to be put upon the law of *England*; which has ever owned right reason for its parent, and dutifully submitted to be guided thereby?

Jurym. If the law, as you say, be reason, then undoubtedly this practice of fining of Juries is most illegal, since there cannot be any thing more unreasonable: but what authorities have you against it?

Barr. You have heard it proved to be a modern upstart encroachment, so you cannot expect any direct, or express, condemnation of it in ancient times; because the thing was not then set on foot. And, by the way, though negative arguments are not necessarily conclusive, yet that we meet with no precedents of old of Juries fined, for giving their verdict contrary to evidence, or the sense of the court, is a violent presumption that it ought not to be done: for it cannot be supposed, that this latter age did first of all discover, that verdicts were many times not according to the judge's opinion and liking. Undoubtedly they saw that as well as we; but knowing the same not to be any crime, or punishable by law, were so modest and honest, as not

to meddle with it. However, what entertainment it hath met with, when attempted in our times, I shall shew you in two remarkable cases.

1. When the late lord chief justice *Keeling* had attempted something of that kind, it was complained of, and highly reſented by the then parliament; as appears by this copy of their proceedings thereupon, taken out of their Journal, as follows.

Die Mercurii, 11 Decembris, 1667.

“ The houſe reſumed the hearing of the reſt of the report touching the matter of reſtraint upon Juries, and *that* upon the examination of divers witneſſes in ſeveral caſes of reſtraints put upon Juries by the lord chief juſtice *Keeling*; and thereupon reſolved as followeth:

“ Firſt, That the proceedings of the ſaid lord chief juſtice, in the caſes now reported, are innovations in the trial of men for their lives, and liberties. And that he hath uſed an arbitrary, and illegal power, which is of dangerous conſequence to the lives and liberties of the people of *England*, and tends to the introducing of an arbitrary government.

“ Secondly. That in the place of judicature the lord chief juſtice hath undervalued, vilified, and condemned *MAGNA CHARTA*, the great *PRESERVER* of our lives, freedom and property.

“ Thirdly, That he be brought to trial in order to condign puniſhment, in ſuch manner as the houſe ſhall judge moſt fit, and requiſite.”

Die Veneris, 13 Decembris, 1667.

“ Reſolved, &c.

“ That the precedents, and practice of fining, or impriſoning, of Jurors for giving their verdicts, are illegal.”

Here your ſee it branded in parliament: Next you ſhall ſee it formally condemned on a ſolemn argument by the judges. The caſe [is] thus.

At the ſeſſions for *London*, *Sept.* 1670 *William Pen*, and *William Mead* (two of the people commonly called *Quakers*) were indiſted, “ for that they with others, to the number of three hundred, on the 14th *Aug.* 22 *Regis*, in *Gracechurch-Street*, did with force, and arms, &c. unlawfully, and tumultuouſly,

“ tuously, assemble, and congregate themselves together, to
 “ the disturbance of the peace; and that the said *William Pen*
 “ did there preach, and speak, to the said *Mead*, and other per-
 “ sons in the open street; by reason whereof, a great con-
 “ course, and tumult, of people in the street aforesaid then, and
 “ there, a long time, did remain, and continue, in contempt
 “ of our said lord the king, and of his law, to the great distur-
 “ bance of his peace, to the great terror, and disturbance, of
 “ many of his liege people, and subjects, to the ill example of
 “ all others in the like case offenders, and against the peace of
 “ our said lord the king, his crown and dignity.”

The prisoners pleading not guilty, it was proved, that there was a meeting at the time in the indictment mentioned, in *Gracechurch-Street*, consisting of three, or four hundred people, in the open street; that *William Pen* was speaking, or preaching, to them: but what he said, the witnesses (who were officers and soldiers sent to disperse them) could not hear.—This was the effect of the evidence; which Sir *John Howel*, the then recorder, (as I find in the print of that trial) was pleased to sum up to the Jury in these, words:

“ You have heard what the indictment is; it is for preach-
 “ ing to the people in the street, and drawing a tumultuous
 “ company after them, and Mr. *Pen* was speaking. If they
 “ should not be disturbed, you see they will go on. There
 “ are three, or four witnesses that have proved this that he did
 “ preach there, that Mr. *Mead* did allow of it. After this you
 “ have heard by substantial witnesses what is said against them :
 “ NOW WE ARE UPON THE MATTER OF FACT, WHICH:
 “ YOU ARE TO KEEP TO, AND OBSERVE, AS WHAT
 “ HATH BEEN FULLY SWORN, AT YOUR PERIL.”

This trial began on the *Saturday*: the Jury retiring, after some considerable time spent in debate, came in, and gave this verdict,—“ guilty of speaking in *Gracechurch-Street*.” At which the court was offended, and told them, they “ had as
 “ good say nothing;” adding,—“ Was it not an unlawful
 “ assembly?—you mean he was speaking to a tumult of peo-
 “ ple there?” But the foreman saying, what he had delivered was all he had in commission; and others of them affirming, that they allowed of no such words as an “ unlawful assembly” in their verdict; they were sent back again, and then brought in a verdict in writing subscribed with all their hands, in these words: “ *We, the Jurors hereafter named, do find William Pen*
 “ to

“ to be guilty of speaking, or preaching, to an assembly met together in Gracechurch-Street, the 14th of Aug. 1670. And
 “ William Mead not guilty of the said indictment.”

* This the court repented still worle, and therefore sent them back again, and adjourned till Sunday morning; but then too they insisted on the same verdict; so the court adjourned till Monday morning; and then the Jury brought in the prisoners generally “ not guilty;” which was recorded, and allowed of. But immediately the court fined them forty marks a man, and to lie in prison till paid.

Being thus in custody, *Edw. Bushel*, one of the said Jurors, on the ninth of November following, brought his *Habeas Corpus* in the court of *Common-Pleas*. On which the sheriffs of London made return, “ That he was detained by virtue of an order of sessions whereby a fine of forty marks was set upon him, and eleven others, particularly named; and every of them being Jurors sworn to try the issues joined between the king, and *Pen*, and *Mead*, for certain trespasses, contempts, unlawful assemblies, and tumults, and who then, and there, did acquit the said *Pen*, and *Mead*, of the same, against the law of this kingdom, and against full, and manifest evidence, and against the direction of the court in matter of law, of, and upon the premises openly in court to them given, and declared; and that it was ordered they should be imprisoned till they severally paid the said fine, which the said *Bushel* not having done, the same was the cause of his caption and detention.†”

The court coming to debate the validity of this return, adjudged the same insufficient: For 1. The words,—“ against full, and manifest, evidence,” was too general a clause: the evidence should have been fully, and particularly recited: else how shall the court know it was so full and evident? they have now only the judgment of the sessions for it, that it was so; but said the Judges “ our judgements ought to be grounded upon our own inferences, and understandings, and not upon theirs.”

2. It

* Note, Though this Jury, for their excellent example of courage, and constancy, deserve the commendation of every good Englishman; yet, if they had been better advised, they might have brought the prisoners in not guilty at first, and saved themselves the trouble, and inconveniencies of these two nights restraint. See *State Trials*, vol. II. p. 606, in fol. Vide note, to Page, 10. and 11.

† See *Bushel's Case* in *Vaughan's Reports* at large.

2. It is not said, that they acquitted the persons indicted against full and manifest evidence, *corruptly* and *knowing* the said evidence to be *full* and *manifest*. For otherwise it can be no crime; for that may seem full, and manifest to the court, which does not appear so to the Jury.

3. The other part of the return, *viz.* That "the Jury" had acquitted thole indicted, against the direction of the court in matter of law, "was also adjudged to be nought, and unreasonable; and the fining the Juries for giving their verdict in any case concluded to be illegal, for the several reasons before recited, and other authorities of law urged to that purpose; and all the precedents, and allegations, brought to justify the fine, and commitment, solidly answered. Whereupon the chief justice delivered the opinion of the court, "I hat *the cause of commitment was insufficient*;" and accordingly the said *Bushel*, and other his fellow-prisoners, were discharged, and left to the common law for remedy and reparation of the damages, by that tortuous, illegal imprisonment, sustained.

Which case is (amongst others) reported by that learned judge Sir *John Vaughan*, at that time lord chief justice of the *Common-Pleas*; setting forth all the arguments, reasons, and authorities, on which the court proceeded therein: from which I have extracted most of the reasons which I before recited for this point, and, for the greatest part, in the very words of that reverend author.

Jurym. This resolution hath, one would think, (as you said) knocked this illegal practice on the head, beyond any possibility of revival; but may it not one day be denied to be law, and the contrary justified?

Barr. No such thing can be done without apparently violating, and subverting, all law, justice, and modesty: for though the *precedent* itself be valuable, and without further enquiry is wont to be allowed, when given thus deliberately upon solemn debate by the whole court; yet, it is not only that, but the sound, substantial, and everlasting *reasons*, whereon they grounded such their resolves, that will, at all times, justify fining of Juries in such cases to be illegal. Besides, as the reporter was most considerable, both in his quality as lord chief justice, and for his parts, soundness of judgment, and deep learning in the law; so such his book of Reports is approved, and recommended to the world, (as appears by the page next after the epistle) by the right honourable the present lord chancellor

lor of *England*; Sir *William Scroggs*, now lord chief justice of *England*; my lord *North*, chief justice of the *Common Pleas*; and, in a word, by all the judges of *England* at the time of publishing thereof; so that it cannot be imagined how any book can challenge greater authority, unless we should expect it to be particularly confirmed by act of parliament.

Jurym. You have answered all my scruples: and since I see the law has made so good provision for Jurymen's privileges, and safety; God forbid any Jurymen should be of so base a temper, as to betray that, otherwise, impregnable fortress, wherein the law hath placed him to preserve, and defend, the just rights, and liberties of his country, by treacherously surrendering the same into the hands of violence, or oppression, though masked under ever so fair stratagems, and pretences. For my own part, I shall not now decline to appear according to my summons; and therefore (though I fear I have detained you too long already) shall desire a little more of your direction about the office of a Jurymen in particular, that I may uprightly, and honestly, discharge the same.

Barr. Though I think, from what we have discoursed, being digested, and improved, by your own reason, you may sufficiently inform yourself; yet, to gratify your request, I shall add a few brief remarks, as well of what you ought cautiously to avoid, as what you must diligently pursue, and regard, if you would justly, and truly, do your duty.

First, As to what you must avoid.

1. I am very confident, that you would not willingly violate the oath which you take: but it is possible that there are such, who as frequently break them as take them, through their *careless custom* on the one hand, or *slavish fear* on the other; against whom I would fully caution you; that you may defend yourself, and others, against any enemies of your country's liberties, and happiness, and keep a good conscience towards God, and towards man.

2. It is frequent, that when Juries are withdrawn, that they may consult of their verdict, they soon forget that solemn oath they took, and that mighty charge of the life and liberty of men and their estates, whereof then they are made judges; and that, on their breath, not only the fortunes of the particular party, but perhaps the preservation, or ruin, of several numerous families does solely depend: Now I say, without due consideration of all this; nay sometimes without one serious thought, or consulted reason, offered *pro* or *con*, presently the foreman
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or one, or two, that call themselves antient Jurymen, (though in truth they never knew what belongs to the place more than a common school-boy,) rashly deliver their opinions; and all the rest, in respect to their supposed gravity, and experience, or because they have the biggest estates, or to avoid the trouble of disputing the point, or to prevent the spoiling of dinner by delay, or some such weighty reason, forthwith agree blindfold, or else go to holding up of hands, or telling of noses, and so the major vote carries away captive both the reason, and the conscience, of the rest: thus trifling with sacred oaths, and putting men's lives, liberties, and properties (as it were) to the hap-hazard of cros or pile. This practice, or something of the like kind, is said to be too customary amongst some Jurors, which occasions such their extraordinary dispatch of the weightiest, or most intricate, matters; but there will come a time when they shall be called to a severe account for their haste, and negligence; therefore have a care of such fellow-jurors.

3. Such a slavish fear attends many Jurors, that let but the court direct to find guilty, or not guilty, though they themselves see no just reason for it; yea, oft-times though their own opinions are contrary, and their consciences tell them it ought to go otherwise; yet, right, or wrong, accordingly they will bring in their verdict; and, therefore, many of them never regard seriously the course, and force, of the evidence; what, and how, it was delivered, more, or less, to prove the indictment; &c. but as the court sums it up, they find: as if Juries were appointed for no other purpose but to echo back, what the bench would have done. Such a base temper is to be avoided, as you would escape being forsworn, even though your verdict should be right: for since you do not know it so to be, by your own judgment, or understanding, you have abused your oath, and hazarded you own soul, as well as your neighbour's life, liberty, or property; because you blindly depend on the opinion, or perhaps passion of others, when you were sworn well, and truly, to try them yourselves. Such an implicit faith is near of kin to that of *Rome* in religion, and, at least, in the next degree, as dangerous.*

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* Though Judges are likely to be more *able* than Jurymen, yet Jurymen are likely to be more *honest* than Judges; especially in all cases where the power of the prerogative, or the rights of the people, are in dispute. Our rights, therefore, both as individuals

4 There are some make a trade of being Jurymen; that seek for the office; use means to be constantly continued in it: will not give a disobliging verdict, lest they should be discharged, and serve no more: these standing Jurors have certainly some ill game to play. There are others that hope to signalize themselves, to get a better trade, or some preferment by serving a turn. There are others that have particular piques, and a humour of revenge against such, or such, parties: if a man be but miscalled by some odious name, or said to be of an exploded faction—straight they cry hang him, find him guilty, no punishment can be too bad for such a fellow; in such a case they think it merit to stretch an evidence on the tenter-hooks, and strain a point of law, because they fancy it makes for the interest of the government; as if injustice or oppression could in any case be for the true interest of government, when in truth nothing more weakens or destroys it. But this was an old stratagem, “if thou suffer this man to escape, thou shalt not be *Cæsar’s* friend:” when *Cæsar* was so far from either needing, or thanking them for, any such base services, that, had he but truly understood them, he would severely have punished their partiality and tyranny.

All these, and the like, pestilent biases, are to be avoided and abominated, by every honest Jurymen.

But now as to the positive qualifications requisite.

1. You that are Jurymen, should, first of all, seriously regard the weight, and importance, of the office: your own souls, other men’s lives, liberties, estates, all that in this world are dear to them, are at stake, and in your hands; therefore, consider things well before-hand, and come substantially furnished, and provided; with sound, and well-grounded consciences,—with clear minds, free from malice, fear, hope, or favour; lest, instead of judging others, thou shouldest work thy own condemnation and stand in the sight of God, the Creator, and Judge of all men, no better than a Murderer, or perjured Malefactor.

2. Observe

individuals, and as a people, are more likely to be secure, while Juries follow the result of their own opinion; for less danger will arise from the mistakes of Jurymen, than from the corruption of Judges. Besides, improper verdicts will but seldom occur; since Juries will avail themselves of the abilities, and learning, of the Judges, by consulting them upon all points of law; and thus to the advantage of information, may add their own impartiality.

2. Observe well the record, indictment, or information that is read, and the several parts thereof, both as to the matter, manner, and form.

3. Take due notice of, and pay regard to, the *evidence* offered for proof of the indictment, and each part of it, as well to manner, and form, as matter: and if you suspect any subornation, foul practice, or tampering hath been with the witnesses, or that they have any malice, or sinister design; have a special regard to the circumstances, or incoherences, of their tales, and endeavour, by apt questions, to sift out the truth, or discover the villiany. And, for your better satisfaction, endeavour to write down the evidence, or the heads thereof, that you may, the better, recall it to memory.

4. TAKE NOTICE OF THE NATURE OF THE CRIME CHARGED, AND WHAT LAW THE PROSECUTION IS GROUNDED UPON, AND DISTINGUISH THE SUPPOSED CRIMINAL FACT, WHICH IS PROVED, FROM THE AGGRAVATING CIRCUMSTANCES, WHICH ARE NOT PROVED:

5. Remember that in Juries there is no plurality of voices to be allowed: seven cannot over rule, or, by virtue of majority, conclude five; no, nor eleven one. But as the verdict is given in the name of all the twelve, or else it is void; so every one of them must be actually agreeing, and satisfied in his particular understanding, and conscience, of the truth, and, righteousness, of such verdict, or else he is forewarned, And therefore, if one man differ in opinion from his fellows, they must be kept together; till either they, by strength of reason, or argument, can satisfy him, or he convince them. For he is not to be hector'd, much less punished, by the court into a compliance: for as the lord chief justice *Vaughan* says well *, " if a man differ in judgment from his fellows, whereby they " are kept a day, and a night, though his dissent may not in " truth be so reasonable as the opinion of the rest that agree; " yet, if his judgment be not satisfied, one disagreeing, can " be no more criminal, than four, or five, disagreeing with " the rest." Upon which occasion the said author recites a remarkable case out of an antient † law-book: " A Juror would " not agree with his fellows for two days, and being demand- " ed by the judges, if he would agree, said, he would first die " in prison; whereupon he was committed, and the verdict " taken: but upon better advice, the verdict of the eleven was " quashed, and the Juror discharged without fine, and the " Justices said " the way was to carry them in carts" (this is

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* Rep. fol. 151

† 41 *Ass. p.* 11

to be understood at assizes, where the Judges cannot stay, but must remove in such a time to another county) "until they agreed, and NOT BY FINING THEM. And as the Judges erred in taking the verdict of eleven, so they did in imprisoning the twelfth." And therefore, you see, on second thoughts released him.

6. Endeavour, as much as your circumstances will permit, at your spare hours to read, and understand, the fundamental laws of the country; such as *Magna Charta*, the petition of right, the late excellent act for *Habeas Corpus*, *Horn's Mirror of Justices*, Sir *Edw. Coke*, in his 2d, 3d, and 4th Parts of the Institutes of the Law of *England*, and Judge *Vaughan's Reports*. These are books frequent to be had, and of excellent use to inform any reader, of competent apprehension, of the true liberties, and privileges, which every *Englishman* is justly intitled unto, and estated in, by his birth-right; as also the nature of crimes, and the punishments severally, and respectively, inflicted on them by law; the office, and duties, of Judges, Juries, and all officers, and ministers of justice, &c. which are highly necessary for every Juryman, in some competent measure to know: for the law of *England* hath not placed trials by Juries, to stand between men, and death or destruction, to so little purpose, as to pronounce men guilty, without regard to the nature of the offence, or to what is to be inflicted thereupon.

For want of duly understanding, and considering, these things, Juries many times, plunge themselves into lamentable perplexities; as it befel the Jury who were the triers of Mr: *Udal*, a minister, who in the 32d year of queen *Eliz.* was indicted, and arraigned, at *Croydon* in *Surry**, for high treason, for defaming the queen, and her government, in a certain book, intitled, "A Demonstration of the Discipline, &c." And though there was no direct, but a scrambling shadow of proof; and though the book duly considered, contained no matter of treason, but certain words which by a forced construction, were laid to tend to the defamation of the government, and so the thing [was] prosecuted under that name; yet the Jury not thinking that in pronouncing him guilty, they had upon their oath pronounced him guilty of treason, and to die as a traitor; but supposing that they had only declared him guilty of making the book; hereupon they brought him in guilty: but when, after the Judge's sentence of death against him, which they never in the least intended, they found what they had done; they were confounded in themselves, and would have done any thing in the world to have revoked that

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* See *State Trials*, fol. vol. I, p. 161.

unwary pernicious verdict, when, alas! it was too late, Dr. Fuller has this witty note on this gentleman's conviction, "that it was conceived *rigorous* in the *greatest*, which at best" (saith he) "is *cruel* in the *least* degree." And it seems so queen Elizabeth thought it, for she suspended execution, and he died naturally. But his story survives, to warn all succeeding Jurymen to endeavour better to understand what it is they do, and what the consequences thereof will be.

7. As there is nothing I have said intended to encourage you to partiality, or tempt any Jurymen to a connivance at sin, and malefactors, whereby those pests of society should avoid being brought to condign punishment, and so the law cease to be a terror to evil-doers, which were in him an horrible perjury, and indeed a foolish pity, or *crudelis misericordia*, "a cruel mercy;" (for he is highly injurious to the good, that absolves the bad, when real crimes are proved against them;) so I must take leave to say, that in cases where the matter is dubious, both lawyers, and divines, prescribe rather favour, than rigour. An eminent and learned Judge* of our own, has in this advice and wish gone before me: *Mallem reverà viginti facinorosos mortem pietate evadere, quàm justum unum injuste condemnari.* "I verily" (saith he) "had rather twenty evil-doers should escape death through tenderness, or pity, than that one innocent man should be unjustly condemned."

I shall conclude with that excellent advice of my lord Coke †, which he generally addresses to all Judges, but may no less properly be applied to Jurors:—

Fear not to do right to all, and to deliver your verdicts justly according to the laws; for fear is nothing but a betraying of the succours that reason should afford: and if you shall sincerely execute justice, be assured of three things:

1. Though some may malign you, yet God will give you his blessing.

2. That though thereby you may offend great men, and favourites, yet you shall have the favourable kindness of the Almighty, and be his favourites.

And lastly, That in so doing, against all scandalous complaints, and pragmatrical devices, against you, God will defend you as with a shield.—"For thou, Lord, wilt give a blessing unto the righteous, and with thy favourable kindness wilt thou defend him as with a shield." *Psalms* v. 15.

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* Fortescue, cap. 27.

† In the Epilogue of his 4th Part of *Institutes*.

A P P E N D I X.

LONG as the Trial by Jury has been regarded as the Bulwark of public liberty, and individual property, and profuse as have been the panegyrics lavished upon it's institution, it is matter of some surprize to a reflecting mind, that few of our lawyers, statemen, or legislators have ventured to explore its first principles; or examine the deviations from them which have been produced by the gradual operation of time, and eagerly sanctioned by the agents of corrupt power.

The democratic part of the British Constitution, exists in the double representation of the people:—First, As makers of laws in the House of Commons,—and Secondly, As guardians of those laws in the Trial by Jury—and as the great end of society is the impartial administration of justice, which secures both our persons and properties, an enquiry into the original and present state of this our boasted privilege; Trial by Jury, must be worthy the attention of our countrymen. The learned author of the foregoing tract, has expatiated fully upon the antiquity, rights, functions, and privileges of Juries; but has not entered upon any elucidation, of the manner in which juries are and have been impannelled—and as the peculiar attribute of a Jury in the eye of the law is impartiality, the manner in which juries are impannelled must be a matter of importance to every real friend of the constitution at all times; but, more particularly in times like the present, when the theory of government, and the first principles of society are made subjects of legal investigation, and are submitted as the ground work of a verdict from a jury.

Vain is the precaution of securing our liberties by a trial of our equals, if in the constitution of that trial, partiality can intervene, and triumph over innocence and truth, by assuming the garb of national justice. The selection of impartial Jurors, implies an impartial power to select, for to say that Jurors shall be impartial, without some positive assurance of the impartiality of the selecting power, is a mere delusion. Much has been said of the wisdom of our ancestors in instituting the trial by jury, but the wisest part of that institution has been ill protected, and from total disuse is now little known.

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To secure their liberties, their properties and their lives, they did not entrust the impannelling of a jury, to an officer recommended by Judges appointed by the crown, sanctioned by regal authority, and for the most part influenced by aristocratical connections; but to a sheriff annually elected by their own free voice, in a public assembly; where every freeman had a vote.* To an officer thus *elected* was permitted the power of impannelling juries; but yet so fearful were our ancestors of partiality and influence, that six of the Jurors were by law obliged to be of the hundred in which the supposed offender resided, or the supposed offence was committed; and without this competent number of hundredors, the Jury was illegal and the verdict null.

To prevent the supposition of an over-weening partiality in these six from their local connections, acquaintance or private friendships; the remaining six, were to be chosen indifferently by the sheriff from various parts of the county.

To a jury thus impannelled by a public officer, freely and annually elected, did our ancestors submit their mutual wrongs for redress, and their differences for reconciliation. To such a jury it might with truth be said, "which country you are."

Had our ancestors shewn as much vigilance in preserving as wisdom in framing this system, it would not at this day have been reduced so far below its original merit; but, they were too little sensible of its value, while on the contrary, their enemies were well aware that it was incompatible with favouritism and public extravagance; accordingly in the infamous reign of Edward the Second, an act was obtained under the usual pretences, (see page 5, of the foregoing tract;) taking the right of electing

* " Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by statute, 28 Edward I. c. 8. that *the people* should have election of sheriffs in every shire, where the shrievalty is not of inheritance.—For antiently in some counties the sheriffs were hereditary; as I apprehend they were in Scotland, till the 20 George II. c. 43; and still continue in the county of Westmoreland to this day. The reason of these popular elections is assigned in the same statute, c. 13. That the commons might chuse such as would not be a burthen to them.—And herein appears plainly a strong trace of the democratical part of our constitution, in which form of government it is an indispensable requisite, that the people should chuse their own magistrates."

Vide Blackstone's, Com. vol. I, chap. 9, page 339.

electing sheriffs from the people and vesting it in the government. The County of Westmoreland, and the City of London alone escaped this invasion of public liberty; in the former, the sheriff is *hereditary*, and the sheriffs of the latter, who are elected, are by prescriptive right, also sheriffs for the County of Middlesex.

Thus was at once torn from the people, the most valuable of their constitutional rights; nearly the whole impannelling of juries, being thrown into the hands of the crown, and a door opened to influence, and intrigue which is always to be apprehended from government; for as Judge Blackstone justly observes, (*Vol. III. Chapter 23. page 379. last edition;*) “ it is not to be expected from human nature that *the few*, should be always attentive to the *interests* and *good* of the *MANY*— and whenever the administration of justice is entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the state; their decisions in spite of their own natural integrity, will have frequently an *involuntary bias* towards those of *their own rank and dignity*.”

Though the foregoing detail, points out a most alarming breach, in the fundamental principles, of the trial by jury, and sufficiently proves what a track of deviation we are at this day currently pursuing, falsely conceiving it, the old high road of the constitution; yet perhaps our properties and lives, might be tolerably safe, had not another most flagrant abuse of the wise institutions of our forefathers, prevailed of late years, almost to the exclusion of the common law of this realm: viz, the practice of trying almost every cause, in which government is concerned, by a special jury. The origin of special juries, cannot be very exactly ascertained, but, is doubtless, every antient, and seems to have been founded upon the purest principles of justice. In cases, where the sheriff though annually elected, was supposed to be, either interested, or influenced, as in cases of relationship, friendship, pecuniary interest or connections, or being himself party to the suit, he was not entrusted to return the jury; but the writ was directed to the coroners, if an exception laid against them, to two clerks of the court, or to two persons of the county, who were sworn to impanel a jury without favour or partiality, and were called *Elisors* or *Electors*.*

After

* This we may reasonably suppose to have been the origin of special juries, though not expressly stated so in the law-books

After the popular election of sheriffs was annulled, this custom died away, till the progress of trade, and commerce filled the courts of law, with various mercantile disputes, which the yeomanry, and freeholders, of the counties in general, were not competent to decide upon; and this introduced the present formula of special Juries; without reviving their original spirit and justice. So far indeed, did this latter description of special Juries, differ from the original, that their legality was held doubtful, till established by an act, passed in the Third, of George the II. This act not only established their legality (if any act can) but extended their powers, to cases in which government itself, should be the prosecutor.

Thus are special Juries, become a direct contrast to what they originally were. Since formerly, the intention in deviating, from the ordinary mode of impannelling, was to prevent a party concerned from having any influence in selecting the Jury; while at present the deviation gives to a party, always the strongest, an additional power of using such influence. Does not our tame submission to such practices, afford too much reason to say, that we are become a direct contrast to our ancestors?

These defects have been pointed out in conformity, with the sentiments of our great law luminary, Judge Blackstone, who observes, "yet after all, it must be owned, that the best and most effectual method to preserve, and extend the trial by Jury in practice, would be by endeavouring to remove all the defects, as well as to improve the advantages, incident to this mode of enquiry. If justice is not done to the end
" tire

books, and though quite different to the present form of impannelling special Juries:—Blackstone says, "The Jurors contained in the pannel are either *special* or *common* Jurors. Special juries were originally introduced in trials at bar, when the causes were of too great nicety, for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such *apparent* cause, as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon to attend the *prothonotary* or other proper officer with his freeholder's book; and the officer is to take *indifferently* Forty-eight of the *principal* freeholders in the presence of the attorneys on both sides; who are each of them to strike off twelve, and the remaining twenty-four, are returned upon the pannel. Vide Com. vol III chap. 23,"

“ tire satisfaction of the people, in this method of deciding
 “ facts, in spite of all encomiums, and panegyrics, on trials at
 “ the common law, they will resort in search of that justice to
 “ another tribunal; though more dilatory, though more expen-
 “ sive, though more arbitrary in its frame and constitution. It
 “ justice is not done to the crown, by the verdict of a Jury,
 “ the necessities of the public revenue, will call for the erec-
 “ tion of summary tribunals.”

“ It is a circumstance well worthy an Englishmans obser-
 “ vation, that in Sweden, the trial by Jury, that Bulwark of
 “ Northern liberty, which continued in its full vigour, so late-
 “ ly as the middle of the last century, is now fallen into dis-
 “ use; and that there, though the regal power is in no coun-
 “ try so closely limited, yet the liberties of the commons, are
 “ extinguished, and the government is degenerated into a
 “ mere aristocracy, for every new tribunal erected for the
 “ decision of facts, without the intervention of a Jury, whe-
 “ ther composed of justices of the peace, commissioners of
 “ the revenue, judges of a court of conscience, or any other
 “ standing magistrates, is a step towards establishing aristo-
 “ cracy, the most oppressive of absolute governments. As
 “ an instance of which in every country on the conti-
 “ nent as the trial by the peers, has been gradually disused,
 “ so the nobles have increased in power, till the state has been
 “ torn to pieces by rival factions, and oligarchy in effect has
 “ been established, though under the shadow of regal govern-
 “ ment; unless where the miserable commons have taken
 “ shelter under absolute monarchy, as the lighter evil of the
 “ two” * “ It is therefore upon the whole, a duty which
 “ every man owes to his country, his friends, his property, and
 “ himself, to maintain to the utmost of his power, this valuable
 “ constitution in all its rights, to restore it to its antient dig-
 “ nity, if at all impaired by the different value of property,
 “ or otherwise deviated from its first institution; to amend it
 “ wherever it is defective, and above all, to guard with the
 “ most jealous circumspection, against the introduction of new
 “ and arbitrary methods of trial, which, *under a variety of*
 “ *plausible pretences*, may in time imperceptibly undermine this
 “ best preservative of liberty.”

To

* This remark has proved almost prophetic, with respect to Sweden; may that event prove a warning to the unprincipled factions in our own aristocracy.

To follow our quotation through the whole of what this learned author has said, on the subject of Trial by Jury, would exceed our limits :—But we earnestly wish every true friend to the constitution, to peruse the original, fully, and attentively. We cannot however, pass unnoticed, a hint thrown out by him, viz. that it would be a great improvement of our constitution, if juries were chosen by lot.

It is almost superfluous to point out means of executing a proposal so easy, but, let us suppose that previous to the sitting of any court of judicature, every parish in the county or city, where the court was to be held, should be required to return one or two Jurymen, taken by chance from all the eligible names in each parish : Jurymen would in such cases, be generally strangers to each other, consequently not influenced by private considerations, as party prejudices, friendship or enmity, reputed talents, riches or poverty ; circumstances which it is well known too frequently interfere with the deliberations of juries : The public would be relieved from that infamous tribute which they now pay to returning officers, and the practice of packing juries, that bane of our constitution, must cease for ever.

F I N I S.



